Caribe Staple Co., Inc. *and* Juan Suarez *and* Jose E. Rios-Rodriguez *and* Richie Vazquez *and* Union General de Trabajadores de Puerto Rico. Cases 24–CA–6381, 24–CA–6399, 24–CA–6551, 24–CA–6569, 24–CA–6586, and 24–CA–6701

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On August 16, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support of the cross-exceptions and in answer to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The General Counsel cross-excepts to the judge's failure to include in the recommended Order a provision providing that the notice be written in both English and Spanish and that it be mailed to all employees, as well as posted at the Respondent's facility. It appears from the record that some, if not most, of the employees are primarily Spanish-speaking. Further, the General Counsel alleges, and the Respondent does not contest, that the plant has been closed. Accordingly, we find merit to both of the General Counsel's cross-exceptions and shall order that the notice be posted in both English and Spanish[4] and mailed to the employees who were working at the facility at the time of its closure.[5] We leave to the compliance stage final determination as to the date of the facility's closure.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that the General Counsel did not except to the judge's finding that the Respondent did not engage in overall bad-faith bargaining.

[3] We shall modify the judge's recommended Order to include the Board's standard reinstatement language and the judge's recommendation that the certification year be extended by 1 year. We shall also modify the judge's recommended Order to include Miguel Ramirez, whom the judge inadvertently omitted, and to correct the spelling of the names of some of the discriminatees.

[4] See, e.g., *Sun World, Inc.*, 271 NLRB 49 fn. 1 (1984).

[5] See, e.g., *GHR Energy Corp.*, 294 NLRB 1011 fn. 5 (1989).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Caribe Staple Co., Inc., Luquillo, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a), (b), and (c).

''(a) Offer Juan Suarez immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

''(b) Make whole, with interest, the employees listed below for losses each sustained by reason of a 3-day discriminatory suspension:

Carlos Baez	David Casillas
Randolph J. Feliciano	Miguel Ramirez
	Luis M. De Jesus Cepeda
Safin Figueroa	Miguel Garcia
Gilberto Gonzalez	Ruben Hernandez
Jose E. Laureano	Celestino Montanez
Efrain Pagan	Eric Soto
Hector Western	Miguel Rivera
Angel M. Rosa	

''(c) Remove, delete, and expunge from the employment records of Juan Suarez and the 16 employees named above any and all references to the discharge and suspensions, respectively, and inform them that these incidents will not in any fashion be used against them in the future.''

2. Substitute the following for paragraphs 2(e), (f), and (g) and reletter the subsequent paragraph.

''(e) On request, bargain with the Union as the exclusive representative of employees in the above-described unit, as if the initial year of certification has been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order in this case and, if an understanding is reached, embody the understanding in a signed agreement.

''(f) Post at its facility in Luquillo, Puerto Rico, copies of the attached notice marked ''Appendix.''[105] Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

ensure that the notices are not altered, defaced, or covered in any other material.

''(g) Mail copies of the notice in both English and Spanish to each employee employed by the Respondent at the time of the facility's closure.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT instruct employees not to engage in union activity.

WE WILL NOT create the impression that union activity is subject to surveillance.

WE WILL NOT direct employees to quit their jobs if they wished to form a union.

WE WILL NOT threaten that the plant will close because employees have engaged in union activity.

WE WILL NOT declare that union organization would be futile as the Company will never accept a union.

WE WILL NOT inform employees that they will be watched because of their union affiliation.

WE WILL NOT threaten that union leaders will be discharged.

WE WILL NOT inform employees that they could vote in a representation election as long as they vote against the Union.

WE WILL NOT threaten to challenge ballots at a representation election because of a voter's union sentiment.

WE WILL NOT request employees to spy and report back on union activity.

WE WILL NOT create the impression that future union activity will be subject to surveillance.

WE WILL NOT discourage membership in Union General de Trabajadores de Puerto Rico, or any other labor organization, and WE WILL NOT discourage employees from participating in protected concerted activity by discharging, suspending, or in any other manner discriminating against our employees with respect to wages, hours, or other terms and conditions or tenure of employment.

WE WILL NOT refuse to bargain in good faith with the Union General de Trabajadores de Puerto Rico, as exclusive representative of employees defined immediately below by refusing to meet at reasonable times or refusing to meet unless the Union agreed to reduce the size of its negotiation term, to withdraw all pending unfair labor practice charges, to waive the right to file such charges in the future, to agree that daily negotiations would not exceed 4 hours, and to submit a written bargaining agenda to us prior to each session. The appropriate collective-bargaining unit consists of the following employees:

> All production and maintenance employees, including leadmen employed by us at our place of business in Luquillo, Puerto Rico, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Juan Suarez immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits he sustained by reason of our discrimination against him, plus interest.

WE WILL make the employees listed below whole for any loss of earnings they sustained by reason of our discrimination against them plus interest, as set forth in the decision of the administrative law judge:

Carlos Baez	David Casillas
Randolph J. Feliciano	Miguel Ramirez
Safin Figueroa	Luis M. De Jesus Cepeda
Gilberto Gonzalez	Miguel Garcia
Jose E. Laureano	Ruben Hernandez
Efrain Pagan	Celestino Montanez
Hector Western	Eric Soto
Angel M. Rosa	Miguel Rivera

WE WILL notify Juan Suarez and the 16 employees named above that we have removed from our files any reference to the unlawful discharge and suspensions, respectively, and that our actions in that respect will not be used against them in the future in any way.

WE WILL, on request, bargain with the Union, as the exclusive representative of employees in the above-described unit, as if the initial year of certification has been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order in this case, and WE WILL put in writing and

sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

CARIBE STAPLE CO., INC.

Antonio Santos and *Virginia Milan, Esqs.*, for the General Counsel.
Victor M. Comolli, Esq., of San Juan, Puerto Rico, and *Richard F. Nelson, Esq.*, of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case[1] was tried in Hato Rey, Puerto Rico, on March 22–25, 29, and 30, 1993, on an initial unfair labor practice charge filed on August 21, 1991, and a fourth consolidated complaint issued on March 27, 1991, alleging that the Respondent violated Section 8(a)(1), (3), and (5) of the Act. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record,[2] including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation duly authorized to do business in Puerto Rico, is engaged in the manufacture of industrial staples from its facility located at Luquillo, Puerto Rico. In the course of that operation, the Respondent annually purchases and receives at its facility goods and materials valued in excess of $50,000 shipped directly from suppliers located outside the Commonwealth of Puerto Rico. The complaint alleges, the answer admits, and I find that the Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union General de Trabajadores de Puerto Rico (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This proceeding follows the Union's designation by a majority at a Board election held on October 17, 1991,[3] among the Respondent's previously unrepresented production and maintenance employees.[4] The complaint is founded on coercive antiunion conduct and discrimination that allegedly took place both before and after the election. In addition, it is alleged that during ensuing contract negotiations, the Respondent, on numerous counts, was guilty of bad-faith bargaining.

B. *The Preelection Period*

1. The discharge of Juan Suarez; related allegations

a. *Union activity*

Juan Suarez was hired by the Respondent in late 1988. He worked as a machinist in the toolroom, along with eight or nine other machinists, under immediate supervision of Jorge Narvaez. He was discharged on August 19. The General Counsel contends that the Respondent took this step as a reprisal for union activity, thus, violating Section 8(a)(3) and (1) of the Act. In addition, the complaint sets forth a variety of independent 8(a)(1) violations, occurring prior to the discharge, and allegedly addressed to Suarez' union activity.

Suarez declares himself to be the original protagonist of the Union. He asserts that he started discussing the possibility of organization with coworkers in March 1991. He avers that those discussions continued through April, and then, on May 30, he actually met with union officials, signing an authorization card on that date, while obtaining blank cards. He claims to have thereafter solicited cards from coworkers, and organized the first union meeting for June 5 at the home of Daniel Vila.[5]

b. *The knowledge issue and related 8(a)(1) allegations*

Although the Respondent contends otherwise, the record contains an admission that, dating back to only a few weeks before the discharge, it at least suspected that Suarez was the leading proponent of the Union.

Thus, on August 2, Suarez, Rafael Parilla, and Daniel Vila were summoned to meet with Production Manager Frank Jaile. Supervisor Narvaez was also present. The complaint imputes independent 8(a)(1) violations to Jaile during the course of this session.

Jaile admits to calling this meeting on August 2,[6] after learning that ''some of the employees were not happy with the Company'' and that he ''heard they were gonna . . . bring a union to the Company.''[7] He admits that he asked the employees why they were not happy, whereupon all denied that this was the case, also denying knowledge of the

[1] Richie Vazquez was an original individual in this proceeding. During the hearing, Cases 24–CA–6518 and 24–CA–6382 were resolved pursuant to an informal settlement stipulation as between the parties. Jt. Exhs. 1(a) and (b). Pursuant thereto, the cases were severed and adjourned sine die pending compliance.

[2] Certain errors in the transcript have been noted and corrected.

[3] Unless otherwise indicated, all dates refer to 1991.

[4] The tally showed that of approximately 114 eligible employees, 2 ballots were void, and 67 cast valid ballots for, and 44 against representation by the Union, with 3 nondeterminative challenges. G.C. Exh. 100(c).

[5] Suarez testified that he organized this meeting, but he could not attend as he was assigned to the second shift and the meeting took place at 3 p.m.

[6] Jaile testified that a fourth employee, identified only as ''Ponce,'' was present. Narvaez confirmed that there were only three. Jaile was mistaken in this regard. Contrary to the General Counsel, the transcript does not appear to be flawed in this respect and I see nothing sinister in this aspect of Jaile's testimony.

[7] Jaile's testimony implies strongly that he considered Suarez, specifically, as the one that would know the most about the rumored union activity.

Union. He then explained that he left a union job in Chicago, but left to work for Duo-Fast after two strikes in 5 years. He admittedly told the employees that ''if they were not happy, I can get the lady from the payroll department to make out the checks, and . . . they could go and get themself a job someplace else where they'd be happy.''

Suarez and Vila, an incumbent employee, agree that Jaile opened the meeting by inviting them to quit if they were unhappy with their jobs. Over Jaile's denials, they testified that Jaile identified them as the union leaders, and stated that he was aware of the June 20 union meeting and knew all who attended. They further testified, also over Jaile's denial, that the latter declared that the Company would not accept a union under any circumstances and that it would prefer to close down and move to Mexico, Costa Rica, or the Dominican Republic.[8] Both relate that Jaile repeated the shutdown and relocation threat several times before the meeting ended.

Jaile's own version of what transpired substantiates that the Respondent violated Section 8(a)(1) of the Act by informing employees that they had a choice between quitting and forming a union and by creating the impression that union activity was subject to surveillance. I also find that the credited, mutually corroborative testimony of Suarez and Vila establishes that Jaile also threatened plant closure and declared that union organization would be futile as the Company would not accept a union.[9] I find that the Respondent violated Section 8(a)(1) in these respects as well.

In addition, Jaile's testimony as to the considerations prompting the August 2 meeting confirms that, at that time, he held Suarez suspect as a key proponent of the Union.

c. *The discharge*

An organizational meeting was held on Sunday, August 18. Suarez participated in arranging that meeting.[10] Approximately 20 employees attended.

According to Suarez, at 2:15 p.m. on the next day, Monday, August 19, he was again summoned to Jaile's office. Suarez requested that he be accompanied by a coworker, Daniel Vila. The request was denied and he and Jaile met alone. Jaile accused Suarez of having clocked in on Friday, August 16, at 6:53 a.m., but then sat in his work area talking, doing nothing until 7:15 a.m. when his supervisor instructed that he go to work. Suarez questioned the accusation, noting that if he had been talking, the other person involved should have been called down as well.[11] Jaile allegedly brushed the point aside, stating that he believed the supervisor's report.[12] Suarez states that he argued back:

> Listen. Let's stop this nonsense. Because, I'm going to tell you something: because of my responsibility, because of my conduct, and because of my attendance to work, you can not—pin me. But, because of the Union, Yes. Yes, because I am the President and Organizer. And I am going to tell you one thing: we are going to have an election. And we are going to win the election. And you are going to receive such a beating at the elections, because we are going to win for so much that you are going to remember us for the rest of your life.[13]

According to Suarez, Jaile at this point stated that he was ''fired.'' Suarez replied, ''Fantastic . . . . then, make my checks out.'' After Jaile stated that Suarez would have to return the next day to pick up his pay, Suarez demanded payment for his mileage, adding that, ''besides when you fire a person, you pay them immediately.'' According to Suarez, Jaile declared, ''I don't have to pay you anything.''

The Respondent contends that Suarez was terminated solely because, in the face of prior warnings, on August 16 he persisted in talking when he was supposed to be working. Narvaez and Jaile agree that past warnings citing Suarez for failing to produce at accepted quality levels figured prominently in the decision. In this connection, the Respondent documented these earlier offenses. Two written warnings were proffered that predated Suarez' May 30 initial contact with the Union. Both related to his production of defective parts. The first was dated April 23.[14] Suarez denied ever seeing this document. It is clear, however, that he did receive a warning on May 3, 1991, reminding that Suarez had been warned previously, but again was producing parts contrary to specifications. He was informed specifically that ''if another problem occurs, you will be suspended or dismissed.''[15] Suarez contested the latter as ''not correct.''

As for the events of August 16, Narvaez testified that, on August 16, 1991, at 7:15 a.m. Suarez was sitting on his bench, talking and ''disturbing'' the work of other employees.[16] He claims that when he attempted to discuss the mat-

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[8] According to Suarez, Narvaez commented that management would learn the identity of employees affiliated with the Union because the cards would be turned over to the Company, and ''we will take matters into our hands.'' Narvaez denied making the comment. This is not the subject of an 8(a)(1) allegation and in the light of several other violations to be found herein, would appear to be cumulative.

[9] Narvaez was examined as to the incident, but professed to a limited recollection. Remarkably, could not even recall that union activity was mentioned on this occasion. Indeed, he initially denied that he was aware that organization activity was in progress at the time. Later, however, he admitted that since June, ''rumors'' to that effect that were ''all over the place.'' It was my impression that he recalled more than he was willing to admit and his performance in this regard, hardly, enhanced my confidence in Jaile's account.

[10] G.C. Exh. 13.

[11] Jaile claims that he had no recollection that Suarez made this point, but denied that Suarez protested that the discharge was falsely grounded because others had to be involved yet were not disciplined.

[12] Narvaez apparently reported the incident to Jaile in writing by a memo dated August 16. R. Exh. 2(b).

[13] Jaile admitted that Suarez blamed the discharge on his union activity.

[14] R. Exh. 2(d).

[15] R. Exh. 2(c).

[16] Narvaez testified that he assumed that the conversation was started by Suarez because he was the only one not working. On cross-examination, Narvaez was asked to elaborate. He testified that most of the other employees were running their machines, while one was reading a blueprint. All were ''doing their jobs'' as they listened to Suarez. Later, he altered his testimony to indicate that none were doing their work. Ultimately, on my questioning, Narvaez testified that Suarez was regarded as the principal offender because he was seated while the others were at their work stations. He conceded that but for this fact, Suarez would not have been terminated. The claim that he caused a disruption was taken as a thinly premised exaggeration.

ter with Suarez, the latter responded in bad language.[17] Narvaez claims that he had warned him orally on three prior occasions about this type behavior.[18]

The Respondent has introduced a document dated August 19, signed by Jaile setting forth the grounds for terminating Suarez, as variously founded on negligent and careless work, recent verbal warnings based on his interference with the work of others, and disrespect toward supervisors. It refers to the August 16 incident, as follows:

> The last example of negligence and carelessness occurred on August 16, 1991 when after having punched the timecard at 6:53 a.m., Suarez did not begin work until 7:15 a.m. when the supervisor told him to get up from the bench and begin to do his work.

Jorge Narvaez also signed that document attesting that it was discussed with Suarez in his presence. (R. Exh. 2(a).) Suarez denied that he had seen this document prior to the hearing.

The strong language used in this letter arouses curiosity, particular when used in revisiting the past warnings for low quality. For Jaile concedes that Suarez' work performance was never again questioned. In fact, Narvaez gave him a very good evaluation in July 1991. Jaile was aware of this appraisal and, thus, agreed that there was no problem with the quality of his performance as of that date. Moreover, Jaile strained in the attempt to give the assigned ground for discharge a more persuasive gloss by linking the August 16 incident to unrelated offenses, by miscategorizing the former as an additional ''example of negligence and carelessness.''

The General Counsel has presented evidence that others received less severe punishment for ''wasting time'' either by talking to coworkers, leaving their work stations, reading a newspaper, repairing personal tools, and even sleeping. (G.C. Exhs. 4(a), Carlos Santos; 4(b), Jose Trevino; 4(c) and (d), Edwin Miranda; 4(e) and (f), Daniel Vila and Victor Cruz; 4(g), Salvador Alvarez; 4(h), Able Santos; and 4(i), Hector Rodriquez Pina.-) The General Counsel also points to the fact that on August 16, others engaged in conversation with Suarez were not disciplined. According to Narvaez, the distinction was based on the fact that Suarez was viewed as having provoked the conversation. Jaile, who made the decision, offered no testimony suggesting that he was aware that this was the case.[19] On cross-examination, he admitted that he never even asked Narvaez to identify those that Suarez was speaking to during the 15-minute interval. Ultimately, he agreed with the General Counsel's observation, that if others were talking to Suarez, they should have been reprimanded.

Proscribed discrimination is fully substantiated in this regard. The Respondent, within a few weeks prior to the discharge, had singled out Suarez as among several suspected instigators of the Union. At the time he and others interested in organizational activity were invited to quit their employment. The discharge a few weeks later, against this background, merited an inference that it at least in part was founded on unlawful considerations. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This was not countered by proof demonstrating that Suarez would have been discharged even had he not engaged in union activity. There is no evidence that any oral warnings for talking or leaving the work area had been committed to writing as was the Respondent's practice, and the General Counsel has offered a number of instances where lesser discipline was meted out to employees who had wasted time, even on multiple occasions. To make matters worse the defense was presented through Jaile and Narvaez, neither of whom, in this instance, impressed as truthful witnesses. Accordingly, the Respondent has failed to present a credible explanation that Suarez would have been terminated had he not engaged in union activity, and it is concluded that he was discharged in violation of Section 8(a)(3) and (1) of the Act.

2. The discharge of Jose Rios

Rios was employed by the Respondent for 10 years' prior to his discharge on September 19, 1991. During his tenure, he worked as a mechanic on the first shift under the supervision of Miguel Ramos. The Respondent asserts that Rios was terminated by reason of his noncompliance with the established attendance policy.

Rios admitted to frequent absences, over the last 5 years' averaging about 30 days per annum. He attributes this to a chronic kidney condition and illness to a son. His disciplinary history for attendance dates back well before the advent of unionization. Warnings that are in evidence begin in 1983, followed by additional citations issued in 1986 and 1988. (R. Exhs. 3(d), (e), and (f).) In fact, in 1988, prior to Jaile's arrival at the plant, Rios had been discharged for absenteeism. He later was rehired.

A warning dated October 18, 1990, stated:

> YOU HAVE A RECORD OF EXCESSIVE AND CONSECUTIVE ABSENCES. YOU ARE ABSENT TOO FREQUENTLY, ON OCCASIONS YOU DO NOT ALWAYS CALL NOR DO YOU BRING A MEDICAL CERTIFICATE. YOU SHOULD ALWAYS NOTIFY IN ADVANCE WHEN YOU ARE GOING TO BE ABSENT. IN THE EVENT OF ILLNESS, YOU SHOULD NOTIFY ON THE SAME DAY AND IF YOU REMAIN ILL, YOU SHOULD NOTIFY THE COMPANY AGAIN.

[17] Narvaez' written account of the incident fails to mention that Suarez showed any disrespect toward him. R. Exh. 2(b). Jaile's written account mentions ''disrespect towards his supervisor'' but not as part of this incident. R. Exh. 2(a). Narvaez claims that he had given verbal warnings for such offenses, but admits that he failed to reduce any to writing.

[18] Narvaez testified that he had warned Suarez for being out of his work area, and wandering around the plant, when he should be working. Jaile agreed that Suarez had been warned in the past for such offenses. Misconduct of this nature, just as the accusations of disrespect toward a supervisor, would entail a significant breach of discipline. Yet, Narvaez prepared nothing in writing to memorialize these warnings. This is important because the Respondent maintains a progressive system of discipline which commences with an oral warning. R. Exh. 1(a), pp. 3 to 5. Only where such warnings are recorded in writing would a personnel file contain the justification necessary to eliminate controversy as to the propriety in moving on to the next disciplinary step. I did not believe Narvaez intimation that in 1991 the use of such written notations was ''not exactly'' the practice. I am persuaded by the General Counsel's argument that no prior infraction was documented because, in fact, none occurred.

[19] Instead, Jaile appeared to argue that the others were working.

> YOUR ABSENCES AFFECT PRODUCTION AND YOUR COWORKERS. WE EXPECT YOUR COOPERATION OR WE WILL BE OBLIGED TO TAKE OTHER MEASURES.[20]

Effective January 31, 1991, the requirement of advance notification was codified in the Respondent's attendance policy. The rule in question provided in material part as follows:

> 1. The person who needs to be absent or arrive late one day, shall call at least one hour prior to the commencement of of his work shift in order to notify the reason for which he will not be coming to work.
>
> 2. The person who is absent without calling, shall not be able to return to work until he speaks with the Superintendent.[21]

The foregoing disciplinary action and publication of the above policy preceded any union activity. By written warning dated May 28, 1991, Rios was informed as follows:

> YOU HAVE A RECORD OF EXCESSIVE AND CONSECUTIVE ABSENCES. ON ONE OCCASION, WE HAD ALREADY GIVEN YOU A WARNING FOR THIS SAME REASON. THEREFORE, ON THIS OCCASION YOU ARE SUSPENDED FROM THE JOB WITHOUT PAY FOR A PERIOD OF THREE WORKING DAYS. THE NEXT TIME YOU WILL BE SUSPENDED PERMANENTLY.
>
> WE EXPECT YOUR COOPERATION. THANK YOU.[22]

There is no evidence that Rios ever had actively engaged in solicitation on behalf of the Union or that he was an early advocate of organization. At best, his involvement was limited to the period after the May suspension. Thus, he did testify that he attended the Las Croabas union meeting in late July, and that a few days later he openly avowed his support by clipping a union button to his company I.D., which he wore to work appended to his shirt collar.[23]

Rios points to two occasions when his supervisor commented to him concerning the Union. He claims that during the month of August, Supervisor Ramos pointed to the button and inquired as to what that was giving Rios. Rios replied that it was giving him union representation and that if Ramos wished to know what else, to contact and inquire of a union representative. Rios adds that 2 or 3 days later, Ramos walked by him and commented, in the presence of Carlos Santos, that if the Union were to wage a strike or stoppage, they would be hurt because they would be replaced, and the factory would continue working no matter what.[24]

Though warned as to the possibility of discharge, in the days that followed the May suspension, Rios was absent, with a medical excuse, on the following days:

June 13	August 16
July 16	August 19
July 17	August 20
August 14	August 21
August 15	August 26

Although, Rios claims to have openly demonstrated union allegiance during this time frame, he was not disciplined despite this cluster of absenteeism.[25]

Jaile claims that he elected to discharge Rios on September 18. His uncontradicted testimony establishes that, without calling in, Rios was absent on Friday, September 13; Monday, September 16; Tuesday, September 17; and Wednesday, September 18. Jaile adds that, during this period, he, without success, attempted to contact Rios. In a memorandum concerning his position, he refers to the prior discipline chronicled above, and then states:

> EMPLOYEE JOSE E. RIOS . . . DID NOT REPORT TO WORK ON ON THE FOLLOWING DAYS, 9/13/91, 9/16/91, 9/17/91, 9/18/91, NOR DID HE CALL. I WAS TRYING TO GET IN TOUCH WITH HIM, WITHOUT SUCCESS.
>
> ON SEPTEMBER 18, 1991, I HAD TO MAKE THE DECISION OF DISMISSING JOSE E. RIOS . . . FROM EMPLOYMENT, AFTER WAITING FOUR (4) CONSECUTIVE DAYS WITHOUT HAVING ANY INFORMATION AS TO HIS ABSENCES.[26]

I have serious concern for the credibility of Rios. But, taking account of the Respondent's union animus, any inference of discrimination would be weak even were one to accept Rios' uncorroborated testimony that he openly displayed union sentiment during this time frame. Nor is the General Counsel's caused strengthened by the possibility that the Respondent might have acted against Rios to eliminate a ''yes'' vote. In contrast with any such speculation, the reason assigned for the termination is virtually unchallenged. No evidenced was adduced that Rios called in at any time during his September absences.[27] The Respondent had every right to demand strict compliance with its policy in this regard, particularly in the case of an individual who had been warned directly and specifically as to this precise requirement. In my opinion, the Respondent has demonstrated beyond question that Rios would have been discharged even if he had not en-

[20] R. Exh. 3(c).

[21] R. Exh. 1(b).

[22] R. Exh. 3(b).

[23] G.C. Exh. 17. The button signified support of the Union. The Union was not in the picture until May 30.

[24] The complaint does not implicate Ramos in any unlawful conduct, and neither incident was the subject of litigation adequate to support an 8(a)(1) finding or remedy.

[25] The General Counsel contends that pretext is somehow suggested by the Respondent's failure to act at this time. I fail to see the logic in this position. The record does not disclose that these absences offended the Respondent's rules, a factor that distinguishes them from those that led to the discharge. Thus, Jaile explained that Rios was not terminated on those occasions because he brought in a medical excuse. As shall be seen, the documented explanation for the discharge, however, explains that the September absences were different because on that occasion he violated the ''call-in'' policy.

[26] R. Exh. 3(a). Rios initially testified that Jaile gave him a discharge letter. However, he then suggested that his memory was frail, but that it was he who requested a dismissal letter. He claims he was told that they do not give dismissal letters. I reject his testimony in this respect.

[27] The fact that Rios in a quarterly evaluation for the period ending July 1, 1991, was awarded an attendance rating of ''very satisfactory,'' is in no way inconsistent with the facts on which the Respondent allegedly acted in discharging him. G.C. Exh. 5(c). The rating merely reflects that Rios had no unexcused absences and did not neglect to call during the period covered by this evaluation.

gaged in union activity, and accordingly, the 8(a)(3) and (1) allegations in his case shall be dismissed.

3. Other interference, restraint, and coercion

a. *By Jorge Narvaez*

The complaint alleges that the Respondent violated Section 8(a)(1) when in April 1991, Narvaez created the impression that union activity was subject to surveillance and threatened that union supporters would be discharged. Neftali Rosa, a machinist on the second shift, averred that in April 1991, when Suarez was transferred to the second shift, Narvaez told him and Alvin Rodriquez, ''not to talk with Juanito Suarez . . . [b]ecause he was marked because of the Union.'' According to Rosa, Suarez was nearby. Suarez was not examined as to the incident. Rodriquez was unavailable for reasons that would not warrant an inference adverse to Rosa's credibility. Nevertheless, the likelihood that Narvaez would have made such a comment at that time is diminished by the fact that no union was involved until May 30. In this instance, I credit Narvaez whose denial is enhanced by the improbable, uncorroborated testimony of Rosa. The allegations are dismissed as unsubstantiated by credible evidence.

It is further alleged that in or about June or July 1991, Narvaez instructed an employee not to engage in union activities. In this connection, Edgardo Ramos, a tool and die maker, testified that, after the initial union meeting at Vila's home, he was approached by Narvaez, who inquired as to whether he knew anything about the Union.[28] Ramos denied knowledge. More importantly, Ramos testified that at a latter time, Narvaez approached him at his work station and told him, ''not to get involved in this thing with the Union.''

Ramos also testified in substantiation of an allegation that about June 1991, Narvaez created an impression among its employees that Respondent was engaging in surveillance of union activity. In this instance, he related that Narvaez came to his work station, stating that ''it was already known who the Union organizers were,'' adding that they were from the toolroom.

Narvaez denied instructing Ramos not to get involved with the Union or stating that he knew the organizers were from the toolroom. On balance, I was inclined to believe Ramos. There was nothing in his testimony that aroused doubt as to his veracity. In this light, Ramos' status as an incumbent employee makes it more difficult to assume that he would have fabricated the illegalities he imputes to his immediate superior. On Ramos' credited testimony, I find that Respondent violated Section 8(a)(1) in June or July 1991 when Narvaez instructed him to refrain from union activity and created the impression that union activity was subject to surveillance.

Narvaez was implicated in further misconduct by employee Vila. In this connection, the complaint alleges that on or about August 1, 1991, Narvaez created an impression that union activity was under surveillance, stated that such activity was being watched, and interrogated employees and threatened them with discharge.

Vila testified that on a Thursday during this time frame, also a payday, Narvaez delivered his paycheck, stating that he had heard that Vila was one of the union leaders, inquiring as to whether that was true. Vila claims that he stated that he would answer if Narvaez would identify the individual that made this report. According to Vila, Narvaez declined, but went on to warn that he was being watched, and that all the union leaders, including Vila would be dismissed. Narvaez denied that he ever made such comments. I believed Vila, an incumbent employee, particularly, in light of Narvaez' professed inability to recall details of the highly unusual and significant meeting called by Jaile the very next day, August 2, with three of his subordinates, as well as inconsistencies in his testimony pertaining to when he learned that union activity was in progress. Accordingly, I find that the Respondent violated Section 8(a)(1) when Narvaez informed Vila that he would be watched because of his known affiliation with the Union, and that he and other union leaders would be discharged.[29]

b. *By Jose Urena*

The complaint alleges that during the preelection period, Jose Urena, about late September or early October 1991, informed its employees that they could vote in the election as long as they voted against the Union. Urena is referred to in the record as the general manager of the plant. He is headquartered in Chicago, and his duties include responsibility for overseeing the Respondent's Caribbean operations.

At the time, Melvin Rodriquez was a temporary quality assurance inspector and some question existed as to his voting eligibility. He testified that, several weeks before the election, he asked Urena if he would be permitted to vote, and the latter allegedly, replied, jokingly, ''if it was 'no,' yes.'''

Additionally, in mid-October 1991, it is alleged that Respondent, by Urena, at the plant, created the impression that union activity was under surveillance and threatened to challenge ballots on the basis of union support. Here again, Rodriquez was the General Counsel's sole witness. He testified that, after his first conversation with Urena, and only a few days prior to the scheduled election, the latter called him to his office and told him: ''We know that you're with a union, and we recommend you not to vote, because, if you do so, we're going to challenge your vote.''

Urena did not appear as a witness. Considering that both conversations related to the eligibility issue, and that the threat to challenge Rodriguez was made with reference to his status as a union supporter, the strain of humor ended, and it is entirely likely that Urena's overall remarks would have been taken seriously, tending to impede the employee's participation in the Board election. The Respondent thereby violated Section 8(a)(1) of the Act.

[28] Narvaez denied questioning Ramos in this regard. However, there is no allegation of coercive interrogation, and, it is not beyond possibility that evidence in the General Counsel's possession would not support a violation under the strictures of *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[29] I shall dismiss the allegation that Narvaez unlawfully created the impression of surveillance. In doing so, I note that, according to Vila's account, Narvaez first sought to verify Vila's reported involvement, and then specifically informed Vila that his source was an informer. I am convinced that Vila had no reasonable basis for assuming that his past union activity had been observed.

C. *The Postelection Issues*

1. Interference, restraint, and coercion

a. *By Jorge Narvaez*

The complaint alleges that, during March or April 1992,[30] Narvaez threatened employees with discharge because of their union activity. Edgardo Ramos, a tool and die maker, supervised by Narvaez, testified that in this time period:

> Narvaez would always be saying, that stuff with the union, that we were being very annoying with this Union thing. And that if we continued to annoy and disturb with this union thing, that he was going to fire us all.

Narvaez denied the threat. As previously indicated, the testimony of this incumbent employee is preferred over that of his supervisor. Although Ramos suggested that Narvaez might have made these remarks in reaction to machinery breakdowns attributed by him to sabotage, the broadly stated threat was indefensible, and violated Section 8(a)(1) of the Act.

b. *By Ignacio Garcia*

The complaint in this respect is based on two incidents. First it alleged that the Respondent violated Section 8(a)(1) on or about April 25, when Garcia allegedly requested that an employee observe and report back concerning the union activity of coworkers, while creating an impression that union activity was under surveillance.

Richie Vazquez, a second-shift mechanic, testified that in April, Garcia inquired as to whether he was going to attend a union meeting concerning negotiations scheduled for that day. Vazquez responded in the negative, whereupon Garcia asked if he would attend and report back on what transpired. Vazquez refused, but Garcia stated that was okay, for he would get someone else. Garcia denied each and every statement attributed to him by Vazquez. I consider it highly doubtful that Vazquez, as an incumbent employee, would have concocted the episode. He was regarded as the more believable witness. I credit him and find the Respondent violated Section 8(a)(1) when in April 1992, Garcia requested that he observe and report back on union activity, and, in doing so, created the impression that future union activity would be subject to surveillance.

The second allegation relates that the Respondent violated Section 8(a)(1) when in early July 1992, Garcia threatened plant closure. To substantiate this allegation, the General Counsel offered the testimony of Jose Monet, whose discharge is the subject of an 8(a)(3) allegation discussed below. Monet testified that several weeks prior to his termination, in early July, he was called to Garcia's office and was told:

> [B]ecause we had brought the Union to the Company, that they were going to close the Company because they did not agree with there being a union in the Company.

Monet's testimony was uncontradicted.[31] However, he was a totally unimpressive witness, whose shortcomings, as shall be seen below, included a bent toward fabrication. My distrust of Monet is sufficiently deep to make it more likely that Garcia was not examined out of oversight than that the incident described by Monet actually took place. In this light, the Respondent is entitled to benefit of the doubt, and I find that it did not violate Section 8(a)(1) in this respect.

2. The alleged discrimination

a. *The alleged lockout/suspension*

On Wednesday, July 8, 1992, most employees on the second shift walked off the job after Richie Vazquez, a member of the Union's negotiating committee, was sent home for disciplinary reasons. On July 9, the Union informed the Respondent in writing that the employees were available to work immediately and offered to return unconditionally.[32] For a number of reasons, the Respondent closed the plant, thus, preventing scheduled third shift from working. In fact, work did not resume until the morning of Monday, July 13, when the plant was reopened.[33] The complaint does not challenge the legitimacy of the discipline meted out to Vazquez. Nor does it question the shutdown between July 8 and 13.

Instead, it alleges that the Respondent violated Sec. 8(a)(3) and (1) when on July 13, 1992, it ''imposed a three-day suspension from work to all of its second shift employees.'' In this connection, on July 14, the Respondent, in writing, informed each of the 15 second-shift employees as follows:

> You have been suspended without any pay during the dates of July 13, 14 and 15, 1992, for your participation in the illegal abandonment of your work on July 8, 1992. We want this to be quite clear for you that the enterprise is not willing to allow this type of attitude and should this occur again you will be subject to immediate discharge.[34]

By letter of July 16, the Plant Manager Urena wrote Union Representative Juan Eliza, clarifying that the suspensions were based on the following:

> The bulletin that was distributed to employees clearly states that the Company would not allow similar wild cat strikes, and that any employee participating in an illegal wild cat strike will be subject to disciplinary action up to and including termination.
> . . . .

[30] In this sector, all dates refer to 1992, unless otherwise indicated.

[31] The Respondent's brief includes a representation that ''Garcia testified that none of the comments attributed to him took place. . . . He denied all allegations of . . . coercion made by . . . Monet.'' Having examined and reexamined Garcia's testimony, I have found no support for this unfortunate commentary on the evidence.

[32] G.C. Exh. 12(a). It appears that a similar message was orally communicated on July 8, contemporaneous with the walkout. Thus, Juan Cortez, a union representative testified without contradiction that he arrived at the plant at 9 p.m., on July 8, and advised the Company that the second-shift employees were willing to return to work and that the Respondent should allow the third shift to report.

[33] G.C. Exhs. 12(b) and (d).

[34] G.C. Exh. 12(e).

> I mentioned to you that the work stoppage carried out by the second shift employees was completely illegal, and that the company had the right to apply disciplinary measures to those employees.

The complaint alleges that the Respondent, by implementing the suspensions, violated Section 8(a)(3) and (1) of the Act.

The right to strike is protected by Sections 7 and 13 of the Act. None of the disciplined participants were linked on a personal basis with any form of misconduct. There is no evidence whatever that this single, spontaneous walkout was in any sense unprotected. Thus, the Respondent, having failed to demonstrate reasonable cause to believe that any employee listed below had engaged in misconduct of a disqualifying nature, the suspension merely for participating in a strike constituted an act of discrimination proscribed by Section 8(a)(1) of the Act:

Carlos Baeza	David Casillas
Randolph J. Feliciano	Luis M. De Jesus Cepeda
Safin C. Figuero	Michael Garcia
Gilberto Gonzalez	Rubin Hernanadez
Jose E. Laureano	Celestino Montanez
Efrain Pagan	Eric Sota
Hector Western	Miguel A. Rivera
Angel M. Rosa	

b. *The Monet discharge and disciplinary warning*

(1) Background

Jose Monet was discharged on July 30, 1992. At the time, he was a member of the Union's negotiating committee. The Respondent contends that he was discharged in consequence of a confrontation on July 29 in which he physically struck Supervisor Ignacio Garcia. In support of the 8(a)(3) allegation, the General Counsel, relying entirely on Monet's testimony, insists that there was no such assault and Monet was terminated on pretextual grounds.

The General Counsel also argues that a report of an oral warning issued by Garcia to Monet at the time of the alleged assault violated Section 8(a)(3) and (1). In this connection, it appears that Monet was responsible for maintenance of five machines. He was excused from work on July 21, 22, and 23, due to his participation in negotiations. Because a holiday weekend intervened, he did not return to work until Monday, July 27. He insists that, on July 20, when he left work, his overall work area was clean, but that when he returned to work on July 27 he found the conditions to be ''deplorable,'' with his work area very dirty. He reported this to Miguel Ramos, his supervisor. Ramos instructed him to clean glue that had spilled in his area. Monet states that he complied.

About 2 p.m., on July 27, according to Monet, he was approached by Garcia, the production supervisor in this area. As I understand Monet's testimony, he had cleaned the area, but not the machines. Garcia instructed Monet to do so. Monet declined, observing that he had left the area clean before his absence to participate in bargaining. Garcia detoured to a meeting in the office, but then returned at shift's close, and started scrapping the machinery himself. In the process, dirt from the equipment fell to the floor already cleaned by Monet. According to Monet, as he was leaving, Garcia told him to remove the dirt from the floor as that was his responsibility under company regulations that had to be obeyed. Monet described his response, as follows:

> ''I told him that that was not my obligation, that I was a mechanic and not a janitor.'' That there were other people who were supposed to do the cleaning job. That I had already cleaned my machinery before I had left, and that I again turned it in clean, and that if he had thrown, if he had dirtied the area, that he would need to find somebody to clean it; that that person was not me.
>
> I told Mr. Garcia that I was aware, as a mechanic, that anytime I fixed equipment, or a piece of machinery, whatever scrap fell out of that, it was my responsibility to pick it up and clean it.

Garcia then went to the office.

Monet admits that as a mechanic his duties included cleanup of the machinery. However, in this instance, he claims that the dirt was so ''drastic'' that all of it could not be removed prior to the end of his shift.

(2) The July 29 disciplinary meeting; Monet's account

There is no question that on July 29, Garcia attempted to deliver a disciplinary report to Monet.[35] The testimony, however, is in conflict as to the circumstances under which this occurred.

Monet claims that on July 29, Garcia, at about 2 p.m., called him to his office. Monet told Garcia that he would not discuss the issue with him, as Ramos, not Garcia, was his immediate supervisor, and that if it were necessary to clear up the misunderstanding, it would be through Frank Jaile.

Later, Monet was called to Jaile's office. He was accompanied by a coworker, Richard Rivera, whom he asked to be a witness. Carlos Maldonado, the second-shift supervisor, Daniel Ortiz, and Garcia were present. Garcia gave him a document[36] and asked Monet if he agreed with it. Monet re-

[35] According to Monet, he was alerted that this would occur on July 28 by his immediate supervisor, Ramos. The latter allegedly reported that Garcia was taking this step because Monet had left his work area dirty and refused to obey an order. Monet testified that Ramos also stated that Garcia had listed him as a witness, but that he told Garcia to remove his name because Monet had never refused an instruction from Ramos. Although Ramos did not testify, I did not believe Monet even as to this tangential matter.

[36] G.C. Exh. 10(a) is an informal report typed on plain company stationery, ostensibly prepared and signed by Garcia and dated July 28. Garcia insists that this document was given to Monet at this meeting. It cited his failure to comply with Ramos' instruction that he remove the glue spillage from the machines and floors in his area, and to comply with his own instruction that Monet do so. Monet denied that this was the document presented to him at that time. Instead, he insists that the document in question was on the Company's standard disciplinary warning form. See, e.g., G.C. Exh. 4(h). He claims that the warning that he received on July 29 stated that he did not do his work properly, would not take orders, failed to work properly and to complete his work, and that he required constant supervision throughout his shift. He claims that his copy of this document was lost before he had an opportunity to read whether it called for a disciplinary warning or discharge. To his knowledge, prior to the hearing, no one from management was ever informed that he did not possess the document. The Respondent first submit-

Continued

jected the report as untrue. Jaile arrived as they were arguing. He asked to speak to Garcia alone, then, came out and told Monet to leave, but to report the next day as usual, explaining that ''there was something of a confusion, and that it had to be fixed.'' Monet's account acknowledges that he argued with Garcia concerning the warning, but he denies ''any aggression'' toward Garcia on July 29.

On July 30, Monet returned to work. At 8:30 a.m., he was told to report to Jaile's office. Rivera again accompanied him. Garcia and Narvaez were also present. According to Monet, Jaile informed Monet that based on Garcia's report,[37] he had not been able to ''rest easily'' with the knowledge that it was necessary to dismiss him. Monet agreed stating that there had been an ''injustice.'' Jaile allegedly stated that ''due to the report written by Mr. Ignacio Garcia . . . the orders were coming from Chicago, and that it was not in his hands.'' Jaile attempted to calm him down, advising that ''if he wanted to get work in another company, that he would give me good references . . . [a]nd there would be no problems.'' It is the sense of Monet's testimony that he was discharged at this point.

If Monet is to be believed, it was at this point that there was the first physical contact between himself and Garcia. He claims that after Jaile's remarks, he got up to shake hands with Garcia, and to say ''that I was congratulating him for his decision to leave my family without their bread on the table.'' Monet testified that Garcia squeezed his hand and pulled his hand forward, and he responded by pulling Garcia back toward himself. Narvaez then jumped in and grabbed Monet by the neck. Rivera pulled Garcia back, and Monet wrested himself free, pleading that he needed air badly because of his heart condition and blood pressure. He left the premises on instruction of a security officer. Monet also denies that he hit Garcia on this occasion.

Monet denies that he was discharged because of his aggressive conduct toward a supervisor. He insists that the reason set forth in the July 29 warning and that given by Jaile for the discharge were one and the same. In fact, he insists that there was no physical contact with Garcia until after the discharge.

(3) The defense

Garcia avers that during the July 29 meeting with Monet, in the presence of employee Rivera, he gave Monet the warning he had prepared the previous day.[38] He informed Monet that it was a verbal warning that would be placed in his file.[39] He related that as he attempted to read the document to Monet, the latter became unruly, shouting obscenities at Garcia and took a swing at Garcia, striking him on the right shoulder. A red mark appeared on Garcia's shoulder, which remained visible when he reported the incident to Jaile about 5 minutes latter.[40]

Narvaez confirmed that he was in the area, and noticed that Garcia had given the warning to Monet, who was overheard arguing with Garcia. As Monet continued to protest, according to Narvaez, both were standing face-to-face, when Monet ''swung out [right to left across his body with the back of the left hand] on him [Garcia] . . . and hit him.''[41] Narvaez testified that he was later shown the red mark that had been left on Garcia's shoulder.

Jaile met with Garcia and Monet separately on July 29. He avers that he informed Monet in the presence of Rivera, that he had been giving blood, and was not feeling well, and therefore was sending Monet home. Monet was told that Jaile would make up his mind as to his decision and advise him the next day.

All agree that the next day, with employee Rivera again serving as Monet's witness, Jaile informed Monet that he was terminated. Contrary to Monet, Jaile testified that he told Monet he would be discharged for ''striking a supervisor.'' Narvaez confirmed that this was the specifically assigned ground, and that Monet responded to it by denying that he hit Garcia. Monet, according to Garcia, continued calling him names, eventually stating that he be given all that he was owed and that the matter be forgotten. Garcia, with corroboration from Narvaez and Jaile, testified that Monet then approached as he was seated, extending his hand, and as Garcia extended his, Monet grabbed it swinging the other arm and striking Garcia at the bridge of the nose, breaking his glasses, and leaving the area above Garcia's eye lacerated and bleeding. As others attempt to pull them apart, Monet tried to kick Garcia with his knee.[42]

(4) Concluding findings

The complaint alleges that the warning of July 29 was issued in violation of Section 8(a)(3) and (1) of the Act. It is apparent from Monet's own testimony that he refused to clean portions of his area that were left in good order prior to his absence to attend negotiations. Garcia's instruction that Monet correct the situation and then clean the floor seemed perfectly logical and addressed routinely to the spectrum of

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ted a copy of G.C. Exh. 10(a) to the General Counsel on September 16, 1992. Except in the highly unlikely event that the Company was aware of Monet's unfortunate separation from the document he claimed to have received, it clearly would not risk substituting a different document. I find that Monet was given G.C. Exh. 10(a) at that time.

[37] This is taken as a reference to the insubordinate behavior depicted in G.C. Exh. 10(a).

[38] G.C. Exh. 10(a).

[39] Garcia testified that a copy was also given to Monet's witness, Rivera.

[40] Jaile testified that shortly after the confrontation he learned from Garcia and Narvaez that as Garcia was delivering the warning to Monet, the latter grew upset and struck Garcia on the right shoulder. He called Garcia to the office where he observed that Garcia's shoulder was still red.

[41] Narvaez testified initially that Garcia was hit ''right on the jaw,'' but immediately thereafter, without prompting, testified that the blow ''caught him in the shoulder.'' It was my impression that the former was simply an unthinking slip, prompted by the fact that the witness seemed to be concentrating on the nature of the swing.

[42] Criminal charges were filed against Monet by Garcia. They were based on the July 30 assault. There was no reference to the July 29 incident. Also, Jaile called the police in connection with July 30, and did not mention what had reportedly occurred the day before. I see nothing unusual in this omission, considering the fact that prior incidents were overwhelmed by what took place on the latter date. In passing, it is noted that, on the date of trial, Garcia withdrew the charges. G.C. Exh. 15. According to Monet, Garcia told the judge that he had worked for many years with Monet and that there never had been a problem and that this incident was spawned ''by pressures that he was under from the office, and from some orders that he was receiving.''

Monet's job responsibilities. On the other hand, Monet's testimony that he, as a maintenance mechanic, was not obligated to obey directives from production supervisors not only was unconfirmed from a single credible source, but struck as illogical. On balance, I find that there is no reason to assume on this record, that Garcia had the obligation to use other means to correct the situation. I find that the warning was grounded on legitimate cause and would have been issued even if Monet had not engaged in union activity.

I reach the same result with respect to the discharge. Monet was an incredible witness, whose dubious testimony was left to stand uncorroborated by the General Counsel's unexplained failure to call Monet's chosen witness to the critical events, Richard Rivera. Beyond that, his demeanor was unconvincing, and the content of his testimony seemed unlikely and deliberately tailored to mitigate and deflect misconduct that he knew to be serious and indefensible. I reject Monet's testimony were at odds with that of the Respondent's witnesses.

Several objective factors suggest that he was guilty of the July 29 assault and that he was told that this was the reason for his termination. Undisputed evidence reveals that, in an unemployment compensation hearing, Rivera testified that Monet had touched the right shoulder of Garcia on that occasion. Monet admitted that this testimony prompted the award which denied him unemployment benefits.[43] In addition, on August 17, Monet submitted the first of two sworn prehearing affidavits to the General Counsel. According to his testimony, he did not know in that time frame that he had been discharged because of any assault. Yet, he took occasion in these statements to set forth past examples of lenience shown by the Respondent toward employees caught fighting. Moreover, according to representation by the General Counsel, both affidavits were submitted before the General Counsel was alerted to the Respondent's position that the altercation was the assigned cause of discharge. I am convinced that Monet included these defensive assertions on his own because, at all times since July 30, he was well aware of the assigned ground for discharge.[44]

I credit the Respondent's witnesses and find that Monet was discharged on July 30, because on July 29 he assaulted Supervisor Garcia as the latter issued a disciplinary warning.[45]

The General Counsel contests the cause assigned as pretextual. The alleged instances of disparate treatment were unimpressive. In the main, this view of the disciplinary history is left to turn on a proffer of facial summaries appearing in the disciplinary reports relied on by the General Counsel in this case, as well as testimonial accounts. The documentation is inconclusive. It merely offers a superficial view of the underlying facts, with such factors as provocation and mitigation left unexplored. In one incident a mechanic foreman threatened another mechanic with a knife and invited him to fight.[46] According to Jaile, he suspended the mechanic foreman. In another incident one employee hit another, and was merely suspended.[47] In another, one employee slapped another, received a verbal warning, and threat of suspension if the incident were repeated.[48] On another occasion, two supervisors had a fist fight which produced a 10-day suspension for each.[49] Finally, there is General Counsel's Exhibit 18(a) which suggests that an employee had exhibited a ''violent attitude'' toward a supervisor. Aside from the absence of definition as to what this meant, the disciplinary event took place prior to Jaile's employment. Moreover, the employee's misconduct was directed toward a general manager whose judgment on discipline, a mere warning, acknowledged a personal friendship since childhood with the employee involved.

In my opinion, the warning notices alone offer no foundation for any fair comparison with the conduct for which Monet was discharged. Moreover, the Respondent effectively counters the General Counsel's presentation in this regard through testimony of Narvaez that some 2 to 3 years earlier Juan Santana, was discharged for assaulting him over a dispute concerning Santana's production of substandard parts.

Beyond that the General Counsel adduced testimony from Manuel Gomez, a mechanic who revealed that in July 1992, during a work-related argument with Supervisor Garcia, he placed his hand on Garcia's shoulder. Garcia claimed that Gomez had pushed him. Garcia told Gomez to accompany him to the office. They latter refused, pointing out that Garcia was not his supervisor. Later, Jaile called him to the office, got his side of the story, and then went off to discuss the issue with Garcia. When he returned, Jaile told him that ''everything was alright that I could return to work.'' Gomez was not disciplined in any way. Although Gomez testified that he believed that his nonsupport of the Union ''saved him,''[50] he later accepted that it was possible that he was spared because his version of the incident, which was in fact witnessed by his supervisor, Miguel Ramos, happened to have been believed by Jaile.

These incidents do not bear sufficient kinship to the assault of a supervisor during a disciplinary interview to arouse doubt that misconduct of this nature constitutes valid cause for discharge. In evaluating evidence of disparate treatment, I have always acted on firm appreciation that disciplinary patterns often are reflective of personal judgment, which does not always come out the same—even in a facially identical context—whether exercised by a different, or even the same, individual. Where an inherently sensible ground for

[43] R. Exh. 6(b).

[44] In this connection, it is entirely possible that Monet's false testimony was inspired by an incorrect reporting of the reason given by the employer for the discharge in an unemployment ruling. Thus, on August 2, a hearing officer issued a determination disqualifying Monet from benefits because he was discharged for failure to follow instructions. There was no reference to an assault. G.C. Exh. 14. On appeal, on October 30, this view of the facts was revised to reflect that Monet was discharged ''because he assaulted a supervisor.'' R. Exh. 6(b). I think it entirely likely that the original determination was founded on a mistaken iteration of the ground for discharge, and that Monet, who denied that he assaulted Garcia on July 29, seized on this error, as a means of substantiating his position that there was no assault and to further the view that the Company used this as a belated, pretextual afterthought.

[45] Consistent therewith, the General Counsel's contention that lesser discipline was meted out for failure to follow supervisory directives is of no consequence. G.C. Exhs. 18(b) through (f).

[46] G.C. Exh. 11(f).

[47] G.C. Exh. 11(a).

[48] G.C. Exh. 11(b).

[49] G.C. Exh. 11(d).

[50] In contrast with Gomez, Monet states that Gomez was involved with the Union, having both attended union meetings and signed a card.

discharge is proven, yet challenged on this ground, it is essential that management's regulation of misconduct in the past be demonstrated by evidence showing an inconsistency so unmistakable as to warrant a reasonable conclusion that the very offense perpetrated by the dischargee had been condoned knowingly where union activity was absent. This standard was not met here and I am persuaded that Monet, even had he not engaged in any union activity, would have been terminated for the legitimate reason assigned by the Respondent. Accordingly, I shall dismiss the 8(a)(3) and (1) allegations in his case.

D. *The Alleged Refusal to Bargain*

1. Preliminary statement

The Union's certification on October 29, 1991, was uncontested. Negotiations opened with Union's submission by mail of an initial proposal on November 25, 1991.[51] Receipt was acknowledged on December 17, 1991,[52] and the Company presented a counterproposal by letter of January 29, 1992.[53] The first bargaining session took place on March 17, 1992.[54] As of the date of the hearing, negotiations had not produced a settlement.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by a variety of specified actions during the course of negotiations. In addition, it is alleged that the Respondent was guilty of overall subjective bad faith as evidenced by various actions taken in connection with respect to the negotiations.

2. The conduct

a. *Attorney Nelson's letter of August 14 and related conduct*

(1) Preliminary statement

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) when, on August 14, Attorney Nelson conditioned further bargaining on the Union's agreement to its demands in several particularized areas, each of which is discussed individually below.[55]

The Respondent's bargaining team was headed by Richard Nelson an attorney based in Chicago, Illinois. The Union's chief spokesperson was its president, Juan Eliza.

By way of background, it is noted that, minutes of the July 23 bargaining session prepared on behalf of the Respondent, include the following:

> The Union was informed that the Company would notify it of a date to resume further negotiations. However, prior to scheduling any date, the Company would send proposed guidelines and ground rules for further collective bargaining negotiations.[56]

By letter of August 10, the Union sought a resumption, declaring availability at any time in the near future after August 17.[57]

On August 14, Attorney Nelson replied:

> We will make ourselves available in September, 1992, to continue further collective bargaining negotiations. However, before we schedule a final date, we are requesting your written confirmation that the following guidelines and ground rules will be abided by:[58]

As shall be seen, these ''guidelines and ground rules'' included demands with respect to both mandatory and nonmandatory subjects. As a general proposition, it is a per se violation of Section 8(a)(5) for any party to hold future negotiations hostage to unilaterally imposed demands, and, absent impasse, such a condition is illegal even with respect to issues properly classifiable as mandatory subjects of collective bargaining.

Before considering the specific allegations, as a preliminary matter, I reject the Respondent's contention that the August 14 letter did not condition the scheduling of a further meeting on the Union's capitulation to these demands. The claim is founded on a remarkable piece of sworn testimony by Attorney Nelson, who seemed to be debating his own draftsmanship, in relating that:

> I subsequently received a letter from . . . the Union's attorney . . . and I . . . prepared a written response . . . explaining the Company's position and that we were not conditioning bargaining on . . . any of these items . . . . Only, we were requesting the Union to . . . provide a response . . . whether they were willing to agree to it or not.

The August 14 letter bears Nelson's signature and he surely understood his own language. The strategy was clearly termed and is susceptible to no other interpretation. It was written in response to the Union's August 10 request for a meeting date, and conveyed unmistakably that the Company would refuse to oblige at any time prior to ''written confirmation'' by the Union that it would abide by each and every demand set forth there. Moreover, the use of ultimatum in this form by Nelson was not unprecedented, first having become manifested at the July 22 bargaining session when he threatened to walk if the Union persisted in filing unfair labor practice charges.

In sum, Nelson's attempt to put a different gloss on the August 14 letter through sworn testimony is unacceptable to the point of embarrassment. Moreover, the incident is not mitigated by the fact that after intervention of the Union's attorney,[59] he wrote the Union on September 2, denying that the Company ''insisted on . . . [the conditions] to impasse.'' Having been educated as to Statutory demands, the followup was nothing more than a quick-step attempt to alter the ad-

[51] G.C. Exhs. 101 (a) and (b).
[52] G.C. Exh. 101(c).
[53] G.C. Exhs. 101(g) and (h).
[54] In this sector of the decision, all dates refer to 1992, unless otherwise indicated.
[55] At p. 48 of the General Counsel's posthearing brief, the latter withdrew an allegation that the Respondent violated Sec. 8(a)(5) and (1) by imposing a limitation upon employee participation in protected activity.
[56] R. Exh. 100(b).
[57] G.C. Exh. 103(a).
[58] G.C. Exh. 103(b).
[59] G.C. Exh. 103(c).

verse legal implications of his August 14 letter.[60] Obviously, the Respondent is not excused from the August 14 stratagem on the fortuitous grounds that the Union elected to resist, rather than yield, in the face of the threat to delay or curtail bargaining.[61]

(2) Restrictions on size of the Union's negotiating committee

In his letter of August 14, Attorney Nelson conditioned future negotiations on the Union's agreement to the following:

> 1. The Union negotiating team will consist of no more than four persons (equal to the number of representatives of Caribe Staple), of your own choosing. However, your selected representatives shall not include Jesus Monet, who was terminated for physically assaulting Caribe Staple Supervisor Ignatio Garcia [sic] on two occasions. For Caribe Staple to negotiate with Jesus Monet on the Union's negotiating committee will be disruptive to the collective bargaining process.

This was an attempt to enforce a demand made earlier by the Respondent. Thus, by letter of June 29, Attorney Nelson, in declaring that bargaining would be resumed on July 20, stated as follows:

> The first topic we intend to negotiate with you is the number of members on your negotiating committee. Bringing in eight to ten employees who participate to no extent in the negotiations is unmanageable and disruptive to the collective bargaining process.[62]

This was the first order of business at the ensuing meeting on July 21, when the Respondent insisted that the union committee be reduced from 10 to 4 persons. The Company argued that ''side comments and sarcastic comments'' attributed to those not involved in the negotiations is disruptive to good-faith negotiations. The Union rejected this position, explaining that the employees on the committee represented the various shifts and distinct classifications. The Company asked that it reconsider, and then discussion proceeded to other areas.[63] In addition, the negotiations continued on that date, and thereafter, on July 22 and 23 without limitation on the size of the Union's negotiating team. However, the August 14 letter sought to enforce the Union acquiescence as the price for a negotiating date. Self-help, in this form, could not lawfully be invoked to force the Union to downsize its negotiating team to the Respondent's suiting.

''[A]bsent any finding of bad faith or ulterior motive on the part of unions . . . it was the duty of the Company to negotiate with the bargaining committees of the Unions . . . even though the temporary representatives were present.'' *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963). See also *General Electric Co*., 173 NLRB 253, 256 (1968), enfd. in material part 412 F.2d 512 (2d Cir. 1969); *Albritton Communications*, 271 NLRB 201, 206 (1984). Here, the record includes allegation, but no proof that the size of the Union's negotiating committee interfered with the process of bargaining. Nelson's generalized testimony that he did not appreciate side comments flowing from members of the union committee was undetailed, and lacked basis for evaluating how any such remarks proved disruptive, and whether reduction of the committee to a total of four would prove salutary in this regard. Nelson's opinion was no substitute for evidence that would allow independent assessment. Accordingly, I find that the Respondent independently violated Section 8(a)(5) and (1) of the Act by declaring that it would not set a negotiating date unless the Union agreed to operate through a committee of designated size.

Other issues are presented by Nelson's insistence that Monet be excluded. Monet, who had been discharged on July 28, earlier had served as a member of the Union's negotiating team during bargaining sessions in March, May, and July.[64] The Board has held, with court approval, that employers may not insist that a discharged employee be removed from a negotiating committee as a precondition to further bargaining. *Vibra-Screw, Inc*., 301 NLRB 371 (1991); *Colfor, Inc*., 282 NLRB 1173 (1987), enfd. 838 F.2d 169 (6th Cir. 1988). However, the Board reached a different result where a union representative, without provocation, physically assaulted the employer's personnel director at the outset of a grievance proceeding. *Fitzsimons Mfg. Co*., 251 NLRB 375 (1980). In doing so, the Board acknowledged that

> where the presence of a particular representative in negotiations makes collective bargaining impossible or futile, a party's right to choose its representative is limited, and the other party is relieved of its duty to deal with that particular representative. [251 NLRB at 379.]

The General Counsel contends that the *Fitzsimons* test was not met here. I agree. There, the assault occurred during the course of grievance negotiations and involved the employer's principal representative. Monet's misconduct, on the other hand, was unrelated to bargaining and involved no confrontation with any management representative that, as of August 14, was a member of the negotiating team. In fact, as the General Counsel observes, the Company raised no objection,

[60] G.C. Exh. 103(e). Cf. *Inter-Polymer Industries*, 196 NLRB 729, 762 (1979), where an employer pursued such demands merely through ''oral persuasion.''

[61] The Respondent cites *Stanley Bldg. Specialties Co*., 166 NLRB 984 (1967), and *I.T.T. Corp*., 159 NLRB 1757 (1966), as standing for the proposition that ''in order to constitute a violation of the Act, the condition must have delayed negotiations or caused an impasse.'' Neither adopts that view. *Stanley Building* did not reach the issue because the employer merely deferred to tactics of persuasion that did not impede the negotiations. *I.T.T.* involved a challenge to an employer's right to refuse to agree to advance the date of a scheduled meeting.

[62] G.C. Exh. 102(i).

[63] R. Exh. 100(a).

[64] The General Counsel's claim that the Respondent seized on this issue as part of a stratagem to disrupt bargaining is well within reason. After intervention of the Union's attorney, the parties reconvened on September 16, 17, and 18. Previously, Ignacio Garcia, Monet's adversary, had not been a member of the Employer's established negotiating team. The Company elected to add him to its team on that date ostensibly to demonstrate that ''the supervisors were not going to any longer be intimidated by employees' actions.'' Monet did not attend on September 16 and 17. Not to be outdone, however, the Union invited Monet to attend the September 18 session. The Respondent used the opportunity once more to demand his exclusion. When the Union refused, the Respondent's negotiators walked out.

and there is no indication that bargaining suffered when Monet attended subsequent bargaining sessions on December 8 and 9. In the total circumstances, I am not convinced that the presence of Monet would have made good-faith bargaining ''impossible.'' I find that the Respondent violated Section 8(a)(5) and (1) of the Act on August 14 when it conditioned bargaining on Monet's removal, and on September 18, when it walked out of negotiations to enforce that objective.

(3) Conditioning bargaining on withdrawal of, and Waiver of right to file, unfair labor practice charges

During the July 22 bargaining session, Nelson admittedly told Eliza that ''if he continues to . . . say he's going to file a charge every time the . . . Company refused to accept one of the Union's proposals . . . we would recess for the day.''

Again, in his letter of August 14, Attorney Nelson indicated that he would not propose a date for any future negotiations unless the Union agreed to the following:

> 2. The Union will withdraw all pending unfair labor practice charges against Caribe Staple alleging an unlawful refusal to bargain. We have met with you on several occasions, discussed mandatory topics of bargaining in good faith and have, in fact, reached many agreements in principle on contract terms with the Union. Therefore your unfair labor practice charges are frivolous. Your tactic of filing unlawful refusal to bargain charges against Caribe Staple will not generate constructive bargaining.
>
> 3. You will cease making threats every time the Company does not agree to one of your proposals that you will file an unfair labor practice charge for unlawful refusal to bargain. As you well know, the law does not require the Company to agree to any of the union demands or compel the company to negotiate with you on permissive topics of bargaining. Such statements and threats by you that you will ''soak'' the Company with unfair labor practice charges are counter productive to the bargaining process and indicate unlawful harassment of the Company. Attempts by you to use the National Labor Relations Act unfair Labor practice procedures to exert pressure on the Company are improper and ineffective.

The Respondent had every right to use persuasive, noncoercive means to convince the Union against over involvement with Board processes.[65] However, it could not lawfully refuse to set a negotiating date until the Union agreed that pending unfair labor practices would be withdrawn,[66] or that none would be filed in the future.[67] Here again, the Respondent violated Section 8(a)(5) and (1) on each count.

(4) Restrictions on length of bargaining sessions

Prior to the August 14 letter, the parties, during almost 10 months that lapsed since the certification had met for a total of about 18 hours. Unabashed at the dearth of time invested in these negotiations, the Respondent, through this document sought to enforce the Union's agreement to the following:

> 5. Negotiations will begin at 10:00 a.m., and last no latter than 2:00 p.m., on each respective day. This is necessary because the representatives of Caribe Staple are required to carry out other Company business while in Puerto Rico. Also, because the Union and many of the employees which it represents have filed several unfair labor practice charges, we are compelled to schedule meetings with NLRB representatives to provide affidavits, information, etc. on those charges while in Puerto Rico.

The obligation to meet at reasonable times is not relaxed by a party's selection of negotiating representatives whose personal circumstances make them available only periodically. *Barclay Caterers*, 308 NLRB 1025 (1992). In the light of the abbreviated negotiations during the 10 months since certification, the unilateral imposition of 4-hour daily time limitation cannot be reconciled with the requirements of Section 8(d) and, in the circumstances, constituted an illegal demand. See, e.g., *Crispus Attucks Children's Center*, 299 NLRB 815 fn. 2 (1990). In any event, it is unlawful to condition future bargaining on acceptance of such a condition. Even were this a mandatory subject, because there was no claim of impasse, the mere fact that the Respondent conditioned further negotiations on the Union's acceptance of this limitation, violated Section 8(a)(5) and (1) of the Act.

(5) Insistence on written bargaining agenda

The August 14 letter goes on to demand that the Union agree to the following demand:

> You will forward directly to me your proposed agenda listing specific topics of discussion for each session. We, in turn, will either agree with your agenda or submit counterproposals. Once we have agreed on an agenda, that agenda will be followed during each negotiating session.

I have no quarrel with the wisdom of this approach. However, matters of this kind are to be discussed and not imposed by one party on the other. Once again, the vice lies in the attempt to force capitulation by declining to agree to any future bargaining session unless the Union acceded to this nonsubstantive, procedural demand. See, e.g., *Hutchinson Fruit Co*., 277 NLRB 497, 498 (1985). By doing so, the Respondent violated Section 8(a)(5) and (1) of the Act.

b. *Dilatory scheduling of bargaining meetings*

The complaint, as amended, alleges that the Respondent was dilatory in arranging bargaining sessions between January 21 and through November 20. During this time frame, the parties met on a face-to-face basis on the following dates: March 17, 18, and 19; May 19; July 21, 22, and 23; and September 16, 17, and 18.

In fact, as events unfolded, these were the only bargaining sessions held during the initial 13 months following certification. To make matters worse, most were limited to a few hours. The root causes for the dedication of minimal time to this effort become evident only after examination of the cir-

[65] See, e.g., *Kent Engineering, Inc*., 180 NLRB 86, 89 (1969).

[66] *Laredo Packing Co*., 254 NLRB 1, 19 (1981); *John Wanamaker Philadelphia*, 279 NLRB 1034, 1047 (1986).

[67] *Athey Products Corp*., 303 NLRB 92, 96 (1981).

cumstances under which meetings were arranged, postponed, curtailed, and held during this time frame.

March 17 and 18. As indicated, the Union presented its initial proposal on November 25, 1991. (G.C. Exh. 101(a).) Having received no response, the Union's spokesperson, Juan Eliza, telephoned Jose Urena, the plant manager, and requested a meeting. Eliza was informed that the Respondent was still examining the Union's proposal. This was confirmed by Attorney Nelson by letter December 17, 1991. He at the same time advised that he would serve as the Company's chief negotiator.

By letter of January 20, Attorney Nelson indicated that the Company was prepared to entertain requests for meeting dates, but that, due to his involvement in ''a lengthy trial,'' he would be unavailable until the last 2 weeks of March.[68] Eliza telephoned Urena protesting any delay beyond February. On January 29, the Respondent submitted its counterproposal, but Nelson reaffirmed that he would not be available until after March 15.[69] By letter of February 26, the Union proposed ''alternative'' dates of March 17, 18, and 19.[70] This was accepted.[71] Face-to-face negotiations began at that time. However, on March 18, the Respondent informed the Union that it would have to cancel the third session that had been scheduled for March 19. Negotiations during this visit to the Island by Attorney Nelson consumed a grand total of less than 10 hours.

May 19. By letter dated April 3, the Union protested a representation by Urena that Nelson would be unable to meet until mid-May, and requested specific dates in April.[72] Confirming an inability to meet in April, the Respondent, by letter signed by Urena purportedly of the same date, proposed May 19, 20, and 21.[73]

As suggested by the Employer, the parties next met on May 19. The General Counsel sought to litigate events at this session under the overall bad-faith allegation. No allegation appears in the complaint suggesting any illegality during this meeting.

Prior to this meeting, a number of incidents had taken place suggesting that employees were engaged in violence against the Respondent's property and sabotage to its operations. On April 22, 1992, a notice was posted concerning vandalism, whereby employees were informed, inter alia, that the offenders will be prosecuted.[74] In this respect, Supervisor Ignacio Garcia described this notice as predicated on broken drains in the restrooms, slashing of supervisors' tires, a smashed fluorescent company sign, the presence of glue in machine gear boxes, etc.[75]

When Attorney Nelson arrived at the plant for the May 19 meeting, he was advised by Jaile that the vandalism had not stopped and that, the night before, a rock had been thrown through a plate glass window.

The union committee was already seated when Nelson and Urena arrived at the conference room. Nelson retrieved a large box, which he placed in front of Eliza. The box contained pieces of a large rock, metal, and broken glass, including a sector of the Company's outdoor sign that had been broken off. It was offered by Nelson with the accusation that members of the bargaining unit were responsible. Nelson stated that that he wanted the property damage stopped immediately, and that if it did not the plant would be shut down. Eliza said, ''if you have complaints concerning vandalism, take them to the police.'' He accused Nelson of disrespect toward himself and the union committee. Nelson again appealed that Eliza direct the represented employees to stop the vandalism. Eliza said ''let's go'' and the Union's bargaining team walked out, without returning that day. Nelson stated that Eliza should not run to the National Labor Relations Board to file unfair labor practice charges because the Company was there to negotiate.[76] The Company waited an hour for the Union to return, and when they did not, went to the Board and itself filed charges.[77]

Bargaining sessions were scheduled for May 20 and 21. Neither was held. Nelson credibly testified that the parties had agreed that these meetings would take place at the plant.[78] He added that at 4:30 p.m. on May 19, the Company received a letter from the Union, requesting that negotiations be resumed but at the Department of Labor in Hato Rey.[79] The Company did not respond, refusing to alter the agreed-upon location. Thus, there were no further negotiations in May. In my opinion, the Union was equally responsible for the breakdown in negotiations at that time and I draw no conclusions adverse to the Respondent from the aborted sessions during that week.

July 21, 22, and 23. Prior to the July meetings, the parties had last met on March 19. Moreover, during the 9 months that lapsed since the certification the parties had dedicated little more than 9 hours to actual bargaining.

Nelson wrote Eliza on June 1, stating:

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[68] G.C. Exh. 101(e). This apparently crossed a letter of January 1, from the Union in the mail. The Union requested meetings on February 4 and 5. G.C. Exh. 101(f).

[69] G.C. Exh. 101(g).

[70] G.C. Exh. 101(i).

[71] G.C. Exh. 101(j).

[72] G.C. Exh. 102(a).

[73] G.C. Exh. 102(b). I draw no conclusions, but call attention to the notation on the Union's letter indicating that it was sent to Nelson via ''Federal Express.'' My curiosity is aroused by the fact that Urena's letter also bears an April 3 date. Though sent from Luquillo, this was time-stamped as received by the Union 6 days later, on April 9.

[74] R. Exh. 11(b).

[75] See also R. Exh. 11, in which additional mischief is outlined by Supervisor Ignacio Garcia as having occurred on May 22, 1992. Jaile confirmed Garcia's accounting, but added that telephone lines were cut on two occasions, the first shortly after the election, and again soon after the employees went on strike on July 30, 1992. The existence of property damage and likely sabotage is confirmed by Richie Vazquez, a witness for the General Counsel, who testified that prior to this meeting he had observed damage in the plant from causes other than normal wear and tear, including knotted rags and pieces of metal wedged in conveyors, the glass doors to the main office broken out, damage to the company sign, and a company car that had been doused with paint.

[76] According to Richie Vazquez, Nelson made this comment on his arrival. Nelson's testimony that it was made as the union committee departed made more sense and is credited.

[77] As matters turned out, both the Union and the Respondent filed unfair labor practice charges addressing events at this meeting. Both were dismissed. R. Exhs. 8(a), (b), and (c).

[78] G.C. Exh. 102(b). I reject Vazquez' testimony that the next meeting was to take place in Hato Rey.

[79] The letter is in evidence as G.C. Exh. 102(c). Its tone is accusatory, and its demand for relocation of the site of negotiations peremptory.

> [O]n May 19, 1992, you and your Union representatives walked out in bad faith. Your actions have caused the Company to incur substantial unnecessary expenses for air fare and travel costs. Therefore we feel it appropriate that the next session be held at a neutral location in Chicago, anytime during the next two weeks.[80]

Other than the fact that Chicago was the home base of the Respondent's representative, that location had no relevance to the negotiations at hand. The plant was in Puerto Rico and reasonableness dictated that negotiations were to take place there and not at some distant location that would place a hardship on the employees and their representative. In the circumstances, this demand that negotiation take place at that location was indicative of bad faith, if not itself unlawful. See, e.g., *Somerville Mills*, 308 NLRB 425 (1992).

The Union, by letter of June 3, asked that negotiations resume on June 15 in Puerto Rico, while stating availability for the balance of the month of June as well as July, and ''to the conclusion of negotiations.''[81] This position was reiterated in the Union's letter of June 5.[82] By letter of June 15, the Respondent advised the Union, as follows:

> Since you have refused to negotiate in Chicago, Illinois, the Company representatives are willing to resume negotiations on 20, 21 and 22 July. Please advise of your committee's availability and proposed place of negotiation.[83]

By letter of June 17, the Union proposed earlier dates during either the last week of June or the first week in July, specifically requesting ''that you . . . reconsider your position of further delaying this negotiation.''[84] The Respondent replied by letter of June 29, declaring that it would be in San Juan to resume negotiations on July 20, 21, and 22.[85] The Union had little alternative, and grudgingly agreed by letter of July 8.[86]

The parties reconvened on July 21.[87] On July 22, before the session began, the Union was advised by the Respondent that it would be necessary to recess early, because the Company had arranged to meet with Board representatives concerning pending unfair labor practice charges that had been filed by the Union.[88]

The July 23 session was also shortened to accommodate the Respondent's attorney. At that time, the Union was first informed that the meeting would end at 1:30 p.m. although Nelson knew in advance of that date that this would be necessary to meet his selected return flight to Chicago.

September 16, 17, and 18. On August 10, the Union advised of its availability to meet after August 17 through any date in September.[89] As indicated by letter dated August 14, Nelson indicated that he would be willing to meet in September. However, he unlawfully refused to schedule ''a firm date'' until the Union assented to certain specified ground rules, including reducing the size of the bargaining committee, withdrawing all outstanding refusal-to-bargain charges, agreeing not to file future charges, and restricting the length of bargaining sessions to 4 hours per day.[90] The Union replied through its attorney, Paul Shacter, who by letter dated August 31, contesting the legality of the conditions imposed by the August 14 letter.[91] As indicated, the Employer thereafter elected not to press its illegal design.[92] By letter of September 3, Attorney Nelson agreed to meet on September 16, 17, and 18.[93] The meetings occurred as scheduled September 16 and 17, running no more than 4 hours each day.

At the meeting of September 18, Monet, a member of the Union's negotiating committee who had attended all bargaining sessions prior to his July 30 discharge, reappeared as part of the union contingent. Consistent with a demand appearing in its August 14 letter,[94] company representatives requested that the Union require Monet to leave. The Union refused, whereupon, the company representatives walked out at approximately 10:30 a.m., frustrating any bargaining that day.[95] I have heretofore concluded, that the Respondent's refusal to bargain on this occasion and to enforce its objection to Monet's presence violated Section 8(a)(5) and (1) of the Act.

December 8. By letter of September 24, the Union sought a resumption of negotiations on October 6 through 9.[96] There was no response, causing the Union, by letter of October 5, to inquire as to the Company's availability.[97] On October 9, Nelson wrote the Union, transmitting a revised proposal on the issue of ''Jury Duty Leave.'' There was no reference to future bargaining sessions. By letter of October 16, Eliza, on behalf of the Union, wrote Nelson, contesting the latter's account of their past deliberations on the jury duty issue, and stating:

> With regard to any proposal that the Company may have, we understand that you must submit it and discuss it at the bargaining table. In fact, we have sent you two (2) communications, via Federal Express, summoning you for bargaining and we have not received a reply from you. We trust you will contact us in the next few days to continue the bargaining process.[98]

By letter of October 19, Nelson replied:

[80] G.C. Exh. 102(d).
[81] G.C. Exh. 102(e).
[82] G.C. Exh. 102(f).
[83] G.C. Exh. 102(g).
[84] G.C. Exh. 102(h).
[85] G.C. Exh. 102(i).
[86] G.C. Exh. 102(j).
[87] The meetings were set back 1 day because July 20 was a legal holiday in Puerto Rico.
[88] The session was terminated at 1 p.m. The appointment at the Board offices was scheduled for 3 p.m. Nelson admitted that he was aware of this appointment prior to July 21, but that he did not notify the Union of the conflict until July 22.
[89] G.C. Exh. 103(a).
[90] G.C. Exh. 103(b).
[91] G.C. Exh. 103(c).
[92] G.C. Exh. 103(e).
[93] G.C. Exh. 103(f).
[94] G.C. Exh. 103(b).
[95] According to Nelson, the Union requested that they adjourn early at one of the September sessions. He admitted, however, that at the outset of the meeting of September 18, he informed the Union that he would be unavailable after 12 p.m. due to ''flight arrangements.''
[96] G.C. Exh. 107(a).
[97] G.C. Exh. 107(b).
[98] G.C. Exh. 107(d).

> Please advise me of alternative dates in November and/or December to continue collective bargaining negotiations.[99]

By letter of October 23, the Union reminded the Respondent of its efforts since September 24 to secure a resumption of face-to-face negotiations, and concluded as follows:

> Given your reiterated attitude of refusal to bargain in bad faith, we are summoning you to bargain during the week of November 9 to 13, 1992.[100]

The request was rejected by Attorney Nelson's letter of November 2. Rather than inform the Union of his availability, Nelson requested that the Union submit dates when it would be available during the first 3 weeks of December.[101] By letter dated November 6, the Union protested the Respondent's practice of putting the onus on it to select negotiating dates, but suggested dates between November 17 and 25, adding that if the Company is unable to meet at those times, ''you tell us when you want to bargain.''[102]

Finally, by letter dated November 20, the Company agreed to meet on December 8, 9, and 10, ''provided negotiations prove fruitful and impasse or breakdown in negotiations do not result.''[103] The Union agreed to these dates. Negotiations resumed on December 8.

The statute does not restrict any party's right to select whom they please as bargaining representative, provided that this designation does not collide with the duty under Section 8(d) ''to meet at reasonable times.'' Considerations of personal convenience, including geographic or professional conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity. An employer acts at its peril when it selects an agent incapacitated by these or any other conflicts. Here, it is apparent from the entire record that the parties met when Nelson was good and ready. This produced an minimal number of scheduled meeting dates within the time frame focused by this complaint. During the first 13 months after the certification, Nelson made four trips to Puerto Rico for purposes of collective bargaining. Negotiations on no one trip exceeded 3 days, with the longest daily session exceeding 4 hours by only 15 minutes. The parties, during this time frame met for a grand total of less than 24 hours.

At a minimum the foregoing evidences a clear noncompliance with the duty to meet at reasonable times. The Respondent thereby violated Section 8(a)(5) and (1) of the Act.

3. Overall bad faith

The General Counsel contends that the Respondent's dilatory practices, and other conduct, exhibited subjective bad faith in the form of an intent to frustrate bargaining. The General Counsel's position in this respect entails no charge of intransigence in the actual give-and-take sector of negotiations, and no effort is made to track or evaluate proposals, counterproposals, and concessions. Cf. *Coastal Electric Cooperative*, 311 NLRB 1126 (1992). Instead the contention rests exclusively on the Respondent's contribution to unconscionable delays in bargaining, inflamed by (1) a pattern of sessions abbreviated in duration to account for the Respondent's lateness, need to conduct other business, or to accommodate travel arrangements; (2) the June 1 demand that negotiations resume in Chicago; and (3) the August 14 refusal to set a meeting date absent union concessions on mandatory and nonmandatory subjects of bargaining.

There is no question that the Respondent aspired to a dominant role in arranging negotiations, and that it actually sought to dictate the time, place, and duration thereof, producing a noncompliance with Section 8(d) of outrageous proportion. This was exacerbated by additional illegal conduct that contributed to further delays in the negotiating process. However, I am unaware of any precedent equating a serious violation of this standard with overall bad faith in the sense that such conduct evidences either a desire on a per se basis (1) to frustrate agreement, or (2) a total rejection of the principles of good-faith collective bargaining. Although I am convinced that the Respondent's approach to bargaining was cavalier, if not lackadaisical, and that the independent 8(a)(5) violations found above constituted a serious threat to the process, I am not convinced that the total circumstances warrant a finding of overall bad faith. The alleged violation of Section 8(a)(5) in this respect shall be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) in June or July 1991 when Machine Shop Supervisor Jorge Narvaez instructed an employee not to engage in union activity, and created the impression that such activity was subject to surveillance.

4. The Respondent violated Section 8(a)(1) when on or about August 1, 1991, Narvaez informed an employee that he was being watched because of his known affiliation with the Union, and that he and other union leaders would be discharged.

5. The Respondent violated Section 8(a)(1) of the Act on August 2, 1991, when Production Manager Frank Jaile directed employees to quit if they wished to form a union, created the impression that union activity was subject to surveillance, threatened plant closure, and declared that union organization would be futile as the Company would not accept a union.

6. The Respondent violated Section 8(a)(1) when on or about late September or early October 1991, General Manager Jose Urena informed an employee that he could vote in a Board election as long as he voted against the Union, and by, in mid-October, creating the impression that union activity was under surveillance and by threatening to challenge an employee's ballot at the election because of he supported the Union.

7. The Respondent violated Section 8(a)(1) when in April 1992, Production Supervisor Ignacio Garcia requested an employee to observe and report back on union activity and by creating the impression that union activity would be subject to surveillance.

[99] G.C. Exh. 107(e).
[100] G.C. Exh. 107(f).
[101] G.C. Exh. 107(g).
[102] G.C. Exh. 107(h).
[103] G.C. Exh. 107(i).

8. The Respondent violated Section 8(a)(1) of the Act by on July 13, 1992, suspending the employees listed below merely because they participated in a work stoppage protected by Section 7 of the Act:

Carlos Baeza	David Casillas
Randolph J. Feliciano	Luis M. De Jesus Cepeda
Safin C. Figuero	Michael Garcia
Gilberto Gonzalez	Rubin Hernanadez
Jose E. Laureano	Celestino Montanez
Efrain Pagan	Eric Sota
Hector Western	Miguel A. Rivera
Angel M. Rosa	

9. The Respondent violated Section 8(a)(3) and (1) of the Act by on August 18, 1991, discharging Juan Suarez in reprisal for his union activity.

10. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including leadmen employed by the Employer at its place of business in Luquillo, Puerto Rico, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

11. At all times since October 29, 1991, the Union has been and is the certified, exclusive bargaining representative of employees in the afore-described appropriate unit.

12. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet at reasonable times and bargain in good faith between January 20 and November 20, 1992.

13. The Respondent independently violated Section 8(a)(5) and (1) by, on August 14, 1992, conditioning any resumption of bargaining on:

(a) The Union's agreement to reduce the size of, and to exclude a former employee from, its negotiation team.

(b) The Union's withdrawal of pending unfair labor practice charges, and waiver of the right to file such charges in the future.

(c) The Union's agreement that daily negotiations will not exceed 4 hours.

(d) The Union's agreement to a procedural format whereby the Union, prior to each session, would submit a written bargaining agenda to the Employer.

14. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

The Respondent, having discharged Juan Suarez unlawfully, shall be ordered to offer him immediate reinstatement to his former position, and to make him whole for loss of wages and benefits incurred from the date of discharge to the date of a genuine offer of reinstatement, less net interim earnings. Moreover, having concluded that the Respondent on July 13, 1992, unlawfully suspended 15 employees for 3 days, it shall be recommended that they be made whole for losses incurred by reason of the discrimination against them. All backpay due under the terms of this recommended order shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as authorized in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Although I have not found that the Respondent was guilty of subjective bad faith, the failure to schedule and participate in bargaining sessions in compliance with Section 8(d) of the Act constituted a flagrant violation of the duty to meet at regular times, and on that basis alone, the Respondent unlawfully denied employees the benefit of collective bargaining and the services of their bargaining representative at all times since October 29, 1991. Accordingly, consistent with the teachings of *Mar-Jac Poultry Co*., 136 NLRB 785, 787 (1962), it shall be recommended that the initial certification year shall start anew at the time that the Respondent begins to bargain in good faith consistent with the Act and the dictates of this recommended Order.

At the same time, I reject the General Counsel's request for extraordinary redress in the form of a recommendation that the Respondent be ordered to (1) commence bargaining within 15 days of a Board Order, (2) bargain a minimum of 15 hours weekly, (3) report every 15 days on the progress of negotiation to the Regional Director, with copies to the Union, and (4) make whole employee negotiators for earnings lost while attending bargaining sessions. The remedies sought are inappropriate. They are nonremedial, but penal in nature, because they go beyond restoration of the status quo and in that sense lack a corrective nexus with any unfair labor practice finding in this case. Moreover, the relief sought assumes that the Board is empowered to sit at the bargaining table, monitoring every move, while dictating procedures at the expense of private agreement. To this extent, it is a remedial package that transcends the Board's limited role of enabling and then enforcing the process of recognition and negotiation. In short, the pressure of governmental intervention inherent in these remedies cannot be reconciled with a Statutory scheme that envisions and seeks to preserve an independent system of free collective bargaining.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[104]

ORDER

The Respondent, Caribe Staple Company, Inc., Luquillo, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to engage in union activity.

(b) Creating the impression that union activity is subject to surveillance.

(c) Directing employees to quit their jobs if they wished to form a union.

(d) Threatening that the plant will close because employees have engaged in union activity.

[104] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Declaring that union organization would be futile as the Company would never accept a union.

(f) Informing employees that they will be watched because of their union affiliation.

(g) Threatening that union leaders will be discharged.

(h) Informing an employee that he could vote in a representation election as long as he voted against the Union.

(i) Threatening to challenge an employee's ballot at a representation election because of his union sentiment.

(j) Requesting employees to spy and report back on union activity.

(k) Declaring that future union activity will be subject to surveillance.

(l) Discouraging union membership and participation in protected concerted activity, by discharging, suspending, or in any other manner discriminating against employees with respect to wages, hours, or other terms and conditions or tenure of employment.

(m) Refusing to bargain in good faith with the Union as the exclusive the representative of employees defined immediately below by refusing to meet at reasonable times; or refusing to meet unless the Union agreed: to reduce the size of, or to eliminate a former employee from, its negotiation team; to withdraw all pending unfair labor practice charges; to waive the right to file such charges in the future; to agree that daily negotiations would not exceed 4 hours; and to submit a written bargaining agenda to the Employer prior to each session. The appropriate collective-bargaining unit consists of the following employees:

> All production and maintenance employees, including leadmen employed by the Employer at its place of business in Luquillo, Puerto Rico, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to Juan Suarez and make him whole for losses sustained by reason of the discrimination against him, with interest, as set forth in the remedy section of this decision.

(b) Make whole, with interest, the employees listed below for losses each sustained by reason of a 3-day discriminatory suspension:

Carlos Baeza	David Casillas
Randolph J. Feliciano	Luis M. De Jesus Cepeda
Safin C. Figuero	Michael Garcia
Gilberto Gonzalez	Rubin Hernanadez
Jose E. Laureano	Celestino Montanez
Efrain Pagan	Eric Sota
Hector Western	Miguel A. Rivera
Angel M. Rosa	

(c) Remove, delete, and expunge, from the employment records of Juan Suarez, and the 15 employees named above any and all references to the discharge and suspensions, respectively, and inform them that these incidents will not in any fashion be used against them in the future.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit, and embody any understanding reached in a signed agreement.

(f) Post at its facilities in Luquillo, Puerto Rico, copies of the attached notice marked ''Appendix.''[105] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[105] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''